

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

ARTIFICIAL CONCEPTION (AMENDMENT) BILL

1996

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Chief Minister**

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OUTLINE

This Bill provides for an application to the court by a couple for a declaration of parentage where a child has been born as the result of *in vitro fertilisation* and—

- the couple are the genetic parents of a child (i.e. they have donated both the egg and sperm for the child);
- at least six weeks and no more than 6 months has elapsed since the birth and the child's home is with them; and
- the birth parents (the woman giving birth and her spouse) are in agreement with the application.

It also provides for

- re-registration of the birth of the child as a result of the order;
- disposition and grants of property in relation to the child; and
- access to information by the child and associated relatives.

The *Artificial Conception Act* as it currently applies provides for presumptions relating to parentage of a child which is the result of artificial conception (described as artificial insemination or the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body). The Act provides that the woman giving birth to the child is for all purposes at law the mother of the child, and her spouse (including a de facto spouse) is for all purposes at law the father of the child. The Act reinforces this by providing that the donor of gametes of the child is not to be considered the parent of the child. This principle is part of uniform legislation throughout Australia, and is also enshrined in the *Family Law Act 1975* (C'th).

The amendments thus provide for a court order to the contrary under the specified circumstances.

Financial Considerations: Any additional demand on the courts and the agencies involved will be absorbed within the current budget allocation at this stage. It is not anticipated that a significant addition to costs will eventuate, given the small number of expected applications.

PART 1 - PRELIMINARY

Clauses 1 and 2 are formal requirements. They refer to the short title of the Bill, and commencement of the Bill, which is to be on a day fixed by the Minister by notice in the Gazette, or in six months, whichever occurs first.

Clause 3 establishes the *Artificial Conception Act 1985* as the Act referred to as the 'principle Act' throughout the amendments.

Clause 4 adds the words "...and for related matters" to the long title of the *Artificial Conception Act*.

The amendments break the current provisions of the *Artificial Conception Act* into two sections, and the main part of the amendments constitute Parts III and IV. "**Part I—Preliminary**" becomes the definitions section. The current remainder of the Act, outlining the principle in relation to parentage set out above becomes "**Part II—Presumptions Relating To Parentage**". The additional sections relating to parentage orders become "**Part III—Parentage Orders**" and "**Part IV Miscellaneous**". The last section also contains consequential amendments of other legislation.

Clause 5 inserts the heading "**PART I—PRELIMINARY**" before section 3 of the Act. This Part comprises the interpretation, or definitions, section.

Clause 6 amends section 3 of the Principal Act by substituting the list of definitions with an expanded list. The new words defined include—

'birth father', which in relation to a child means the man presumed, under Part II of this Act or under the *Birth (Equality of Status) Act 1988*, to be the child's father;

'birth mother', which in relation to a child means the woman who gave birth to the child;

'birth parent', in relation to a child, means the child's birth mother or the child's birth father;

'birth relative', which means a person who was a grandparent, brother, sister, uncle or aunt of the prescribed child before the parentage order was made;

'genetic father', which in relation to a child, means the man whose gametes were used to create the embryo;

'genetic mother', which in relation to a child, means the woman whose gametes were used to create the embryo,

'genetic parent', in relation to a child, means the child's genetic mother or the child's genetic father;

'genetic relative', in relation to a prescribed child, means a person who is a grandparent, brother, sister, uncle or aunt of the child because of the parentage order,

'parentage order' means an order under new section 10;

'prescribed child' means a child in respect of whom a parentage order has been made.

Clause 7 inserts the heading "**PART II—PRESUMPTIONS RELATING TO PARENTAGE**" before section 4 of the Principal Act.

Clause 8 is a technical amendment consequent on the insertion of Parts, to clarify references by substituting the word 'Part' for 'Act' where appropriate.

Clause 9 contains the substantive changes to the principal Act by adding Parts III and IV, with the proposed new sections 8 to 30, and consequential amendments.

After section 7 of the Principal Act the heading becomes "PART III—PARENTAGE ORDERS" and a further heading "*Division I—Obtaining an order*" is added.

Child

New section 8 provides that the Division applies in relation to a child who is born in the Territory as the result of a procedure carried out in the ACT, in which the gametes of a woman who is not the child's birth mother and of a man who is not the child's birth father were used to create the embryo. It applies whether the procedure was carried out before or after the commencement of this Division.

Applying for an order

New section 9: Subsection (1) provides that the genetic parents of a child may apply, in accordance with this section, to the Court for a parentage order in relation to the child.

Subsections (2) and (3) state that an application must be made by both genetic parents unless one of them is dead, in which case the remaining genetic parent may apply

Subsection (4) states that an application may not be made within 6 weeks of the child's birth, but must be made —

- if the child was born before the commencement of this Division — within 6 months after it commences;
- otherwise within 6 months after the child is born.

Making an order

On application by the genetic parents, the Court shall make a parentage order if—

- the court is satisfied that the making of the order is in the best interests and welfare of the child;
- the child's home is, and was at the time of the application, with both genetic parents;
- both genetic parents have attained the age of 18 years and are domiciled in the Territory;
- the Court is satisfied that both birth parents freely, and with a full understanding of what is involved, agree to the making of the order; and
- the Court is satisfied that no unauthorised payment or reward (other than for expenses reasonably incurred) is associated with —
 - the making of the order;
 - any agreement required for the order;
 - the handing over of the child to the genetic parents; or
 - the making of any arrangements with a view to the making of the order;
- the Court is satisfied that both the genetic and birth parents have received counselling and assessment from a counselling service that is not connected with the medical practitioner who carried out the procedure that resulted in the birth of the child or the institution at which it was carried out. However the Court may waive this requirement where the making of the order would not be otherwise contrary to the welfare and interests of the child.

Names of prescribed child

New section 11 provides for the naming of the child. Subsections (1) and (2) state that the child will have

- the genetic parents' surname or whichever combination thereof; and
- the forenames;

the Court, on the application of the genetic parents, approves in the parentage order

Subsection (3) provides that if before the making of a parentage order, the prescribed child had been generally known by a particular name, the Court may, in the parentage order, order that the child shall have that name

Subsection (4) adds the proviso that nothing in this proposed section prevents the changing of any name of a prescribed child, after the making of the parentage order, in accordance with the law of the Territory

A new Division is created after new section 11 called "**Division 2—Effect of orders**"

General effect

New section 12: Subsection (1) provides that the effect of a parentage order is that, for all purposes—

- the prescribed child becomes in law a child of the genetic parents, and the genetic parents become in law the parents of the child as if the child had been born to the genetic parents;
- the prescribed child ceases to be a child of the birth parents or any adoptive parent or guardian, and any such person ceases to be a parent of the child,
- the relationship to one another of all persons shall be determined on this basis.

Subsection (2), however, provides that despite subsection (1), for the purposes of any law of the Territory relating to a sexual offence, where the relationship between persons is relevant (e.g. incest), relationships existing at the child's birth will still be taken to exist, in addition to the new relationships created under the parentage order.

Disposition of property

New section 13: Subsection (1) provides that these new relationships have effect in relation to dispositions of property whether by will or otherwise, and whether made before or after the commencement of this Part

However this does not affect a disposition of property where the disponor has died before the commencement of this Part or the disposition took effect in possession before the commencement of this Part

Subsection (2) states that the rule also does not apply in relation to an agreement or instrument (not being a disposition of property) made or executed before the commencement of this Part

Subsection (3) refers to a disposition of property made by an instrument other than a will which

- could not (apart from this subsection) be revoked or varied by a like instrument;
- had not been given effect before the commencement of this Part; and
- does not appear to include a prescribed child as an object of the disposition.

The person who made the instrument may vary it to exclude a prescribed child from participation in any right, benefit or privilege under the instrument.

Subsection (4) states that the above provisions do not affect the operation of any provision in a will or other instrument (no matter when it was made or comes into operation) distinguishing between prescribed children and other children.

Distribution of property by trustee or personal representative

New section 14: Subsection (1) states that despite any other provision of this Part but subject to this section, a trustee or personal representative does not have to ascertain whether or not a parentage order has been made (which may either entitle or disentitle a person to the property) before conveying, transferring or distributing property to those who appear to be entitled to the property.

Subsection (2) states that a trustee or personal representative conveying, transferring or distributing property in the manner referred to above is not liable to anyone claiming an interest in the property as a result of the making of a parentage order, unless the trustee or personal representative had notice of the claim before the conveyance, transfer or distribution.

Subsection (3) states that nothing in this section limits the right of a person to follow property into the hands of another person, other than a *bona fide* purchaser for value without notice.

Bequest by will to unascertained prescribed child

New section 15: Subsection (1) states that where a testator's personal representative is unable to ascertain the name and address of a beneficiary, under a will which—

- has been made after the commencement of this Part; and
- leaves property to a beneficiary who is not named but who is
 - described as a child of the testator or of a spouse, parent, child, brother or sister of the testator; and
 - a person in respect of whom a parentage order was or has been made;

the personal representative is to give to the Public Trustee a copy of the will and a statement that he or she is unable to ascertain the name and address of the beneficiary.

Subsection (2) provides that where the Public Trustee is given a copy of such a will, the Public Trustee shall, in writing, request the Registrar-General for information to assist in ascertaining the name and whereabouts of the beneficiary.

Subsection (3) provides that where the Registrar-General receives such a request, he or she shall examine the records in his or her possession in an endeavour to provide such information and inform the Public Trustee of the results of that examination

Subsection (4), provides that if the Public Trustee ascertains that beneficiary has died, the personal representative is to be informed of this.

Subsection (5) states that where the Public Trustee is able to ascertain the name and whereabouts of the beneficiary and the beneficiary is over 18 years old, he or she shall determine whether the beneficiary wishes to accept the bequest.

If the beneficiary does not wish to do so, the Public Trustee shall inform the personal representative accordingly;

If the beneficiary does wish to do so, the Public Trustee is to inform the personal representative that the proceeds of the bequest should be transferred to the Public Trustee on behalf of the beneficiary and on receiving them transmit them to the beneficiary accordingly.

Subsection (6) provides that if the beneficiary has not attained the age of 18 years, the Public Trustee shall hold the proceeds on trust for the beneficiary upon the trusts (if any) set out in or arising under the will until the beneficiary attains the age of 18 years and when he or she does, transfer those proceeds to the beneficiary, unless the beneficiary then disclaims the bequest.

Subsection (7) ensures that transfer of the proceeds of a bequest to the Public Trustee by a personal representative shall be taken to be a transfer of the bequest to the beneficiary by him or her

Subsection (8) states that a written statement to the effect that the beneficiary has disclaimed the bequest given by the Public Trustee to the personal representative is, in the course of the administration of the estate, conclusive evidence that the beneficiary has disclaimed the bequest

Subsection (9) re-emphasises that the Public Trustee shall not include in information conveyed to a personal representative under this section particulars that identify or tend to identify the beneficiary.

Gifts *inter vivos*

New section 16 applies to a deed executed after the commencement of this Part by which a gift of money is expressed to be made by a donor to a beneficiary who is

- not named but who is described as the child of the donor or of a spouse, parent, child, brother or sister of the donor,
- is a person in respect of whom a parentage order was or has been made

The section provides that the same rule set out in new section 15 applies to this situation as if

- it was referring to the deed of gift instead of a will;
- it was referring to the donor instead of the testator; and
- it was referring to the money instead of the property.

A new Division is created: "**Division 3—Access to Information**"

Interpretation

New section 17 has the following definitions:

'associated person', which in relation to a parentage order, means the prescribed child, a genetic parent or genetic relative of the prescribed child, a birth parent or birth relative of the prescribed child, or a child or other descendant of the prescribed child;

'birth parent', which in relation to a prescribed child, includes any person who was the guardian of the child before the parentage order was made; and

'identifying information', which in relation to a parentage order, means—

- a copy of, or an extract from, an entry in the Register of Births relating to the prescribed child; or
- information from which the prescribed child, or a birth parent or birth relative of the child may be identified (other than information that consists of a residential address).

Confidentiality of records

New section 18: Subsection (1) provides that except as provided in this Division—

- the records of the Court (other than an order or decision of the Court) relating to proceedings on an application for a parentage order; or
- an entry in the Register of Births relating to the birth of a prescribed child, or a copy of or extract from, such an entry;

shall not be made available to, or be open to inspection by, any person.

Subsection (2) provides that this does not operate to prevent a person whose duties require him or her to do so from obtaining access to information where it is necessary to do so for the administration of this Part.

Right of access to identifying information

New section 19: Subsection (1) provides that unless otherwise provided for in this Division, an associated person is entitled to access to identifying information contained in records kept by the Registrar-General.

Subsection (2) states that a prescribed child (whether the child has attained the age of 18 years or not) is entitled to apply for a copy of, or an extract from, an entry in the Register of Births relating to the child. Any other identifying information may only be applied for with the consent in writing of—

- each of the child's genetic parents;
- each of the child's birth parents; and
- any birth relative who may be identified from the information,

Subsection (3) provides that a birth relative, genetic relative or descendant of a prescribed child is entitled to apply for identifying information only with the consent in writing of the person who may be identified from the information.

Subsection (4) provides that the consent of a person is not required for the purposes of the above two subsections if the Registrar-General is satisfied that the person is dead or cannot reasonably be found.

Provision of information by Registrar-General

New section 20: Subsection (1) states that where, on an application for identifying information the Registrar-General is satisfied that the applicant is entitled to access to that information; and that they have paid the prescribed fee, the Registrar-General shall search the Register of Births and issue the applicant with that information or a notification of the result of the search, whichever applies

Subsection (2) provides that where the Registrar-General is of the opinion that information is required for an improper reason, or the person does not have a proper reason for requiring it, the Registrar-General may refuse to comply with the request

Application to Court in absence of consent

New section 21: Subsections (1) and (2) provide that where a person would, under this Division, be entitled to identifying information with the consent in writing of

another person and that other person has refused to give that consent the first-mentioned person may apply to the Court and the Court may, if of the opinion that there are circumstances that justify it doing so, make an order declaring that the applicant is entitled to access to the identifying information which it specifies.

Subsection (3) states that an order under subsection entitles the applicant to access to identifying information which it specifies.

Application to the Court in other circumstances

New section 22 provides similarly to new section 21 for application to the Court for an order by a person who is not otherwise entitled to, or who has been refused access to, identifying information.

The Court may, if it is of the opinion that there are circumstances that justify it, make an order entitling the applicant to access to the information specified in the order.

Medical information

New section 23 applies to the giving of information concerning the medical or psychiatric condition of an associated person. Where particular information may be disclosed (according to the general law) to an associated person who applies for it, but the medical record holder considers that the disclosure might be prejudicial to the physical or mental health or well-being of the applicant, the medical record holder may refuse to give the information personally and instead disclose it (without identifying a person other than the applicant) to a medical practitioner nominated by the applicant.

A new Division is then created called "**Division 4—Other matters**"

False statements

New section 24 creates the offence of wilfully making a false statement (whether orally or in writing) for the purpose of or in connection with an application for a parentage order. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Personation of birth parents

New section 25 creates the offence of personating, or falsely representing oneself to be, a birth parent for the purpose of or in connection with an application for a parentage order. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Presenting forged agreement

New section 26 creates the offence of presenting to the Court an agreement to the making of a parentage order signed by a birth parent if the signature was known to be forged or obtained by fraud, duress or other improper means. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Legal representation of child

New section 27 provides that the court may order legal representation of the child in proceedings on an application for a parentage order.

Proof of parentage orders

New section 28 provides that in any proceedings in a court in the Territory, a document purporting to be either

- the original or a certified copy or certified extract of a parentage order; or
- an official certificate, entry or record of the making of a parentage order,

is evidence of the facts stated in, and matters appearing from, the document.

A new part is created called "**PART IV—MISCELLANEOUS**".

Determined fees

New section 29 provides that the Minister may, by notice in the *Gazette*, determine fees for the purposes of this Act.

Regulations

New section 30 gives the Executive the power to make regulations to give effect to the Act and, in particular, such matters as the forms to be used giving of information and entries in the Birth Register.

Amendment of *Registration of Births, Deaths and Marriages Act 1963*

Clause 10 provides for amendment of the *Registration of Births, Deaths and Marriages Act 1963* by adding a new Division at the end of Part VI, namely "**Division 3—Substitute parent information**", and adding the following new sections to the Act:

New section 46H Subsection (1) provides that where the Registrar-General receives a sealed copy of a parentage order he or she shall register the order in the Substitute Parent Information Register.

Subsection (2) requires the Registrar-General to keep an index of parentage orders registered in the Substitute Parent Information Register.

Subsection (3) requires the Registrar-General to bring the information in this Division to the attention of any person providing information concerning the birth of a child in respect of whom a parentage order has been made.

[To avoid typographical confusion, there is no section numbered 16I]

Re-registration of birth where parentage order made

New section 46J provides that on receipt of a sealed copy of a parentage order in relation to a child whose birth is registered in the Register of Births, the Registrar-General shall re-register the birth of the child in the Register of Births. Details to be entered include—

- the child's new name;
- the sex, date and place of birth of the child; and
- the genetic parents;
- a notation to the entry to the effect that the birth of the child is registered under this subsection.

Subsection (2) provides that on re-registering the birth of a child under the Registrar-General shall make a notation on the original entry of the birth to the effect that the birth of the child has been re-registered under this Act on a specified page of the Register. This is to apply similarly where the child has been adopted (Subsection (3)).

Amendment of *Substitute Parent Agreements Act 1994*

Clause 11 provides for amendment of section 10 of the *Substitute Parent Agreements Act 1994*. As special provision has been made for the Court to refer to the welfare and interests of the child in making a parentage order, such orders are excluded from the reference in Section 10 of the *Substitute Parent Agreements Act 1994*, which also relates to the welfare and interests of the child in other proceedings relating to substitute parent agreements.